Supreme Court, U.S.
FILED
DEC 20
ALEXANDER L. STEVAS,
CLERK

No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Amicus Curiae, the Massachusetts Hospital Association, Inc.

PATRICK R. CARROLL,
Counsel of Record,
WILLIAM T. McGRAIL,
Attorneys for Amicus Curiae,
MASSACHUSETTS HOSPITAL ASSOC., INC.,
Five New England Executive Park,
Burlington, Massachusetts 01803.
(617) 272-8000

On the Brief:
WENDY K. MARINER,

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Interest of the Massachusetts Hospital Association, Inc.	1
Summary of argument	2
Argument	3
I. Introduction	3
II. The protections afforded under the Eighth Amendment and the Fourteenth Amendment are triggered by an individual's loss of freedom when he cannot, by reason of the deprivation of his liberty, care for himself	4
III. A state or federal statute requiring hospitals to make certain services available does not create an independent obligation on the part of a private hospital to render services without compensation to the hospital	7
IV. The obligation of a governmental subdivision to preserve the constitutional rights of a detainee by making medical care available compels that agency to pay for such care	16
Conclusion	19

Table of Authorities Cited.

Cases.

Bell v. Wolfish, 441 U.S. 520 (1979)	4, 5n, 6
Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977)	5n, 7n
Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980)	6n, 7n
City of Tulsa v. Hillcrest Medical Center, 292 P.2d 430 (Okla. 1956)	15n

Dade Cty. v. Hospital Affiliates Intern., 378 So.2d 43 (Fla. App. 1979) 15n

Dawson v. Kendrick, 527 F.Supp. 1252 (S.D.W.V. 1981) 17n

Dodge City Med. Center v. Bd. of Cty. Comrs., 6 Kan. App.2d 731, 634 P.2d 163 (1981) 6n, 15n

Estelle v. Gamble, 429 U.S. 97 (1976) 3, 4, 17n

Fielder v. Bosshard, 590 F.2d 105 (5th Cir. 1979) 5n

Gregg v. Georgia, 428 U.S. 153 (1976) 5

Guerro v. Copper Queen Hospital, 112 Ariz. 104, 537 P.2d 1329 (1975) 8n

Harris v. McRae, 448 U.S. 297 (1980) 14n

Ingraham v. Wright, 430 U.S. 651 (1977) 4, 5n

Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D. Mass. 1973), aff'd. 494 F.2d 1196 (1st Cir.), cert. denied sub nom. Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974) 17n

King County v. City of Seattle, 70 Wash. 2d 988, 425 P.2d 887 (1967) 16n

Lamar v. Board of Com'rs, 4 Ind. App. 191, 30 N.E. 912 (1892) 15n

Lutheran Medical Center v. City of Omaha, 204 Neb. 292, 281 N.W.2d 786 (1979) 6n, 15n

Massachusetts General Hospital v. Revere, 385 Mass. 772, 434 N.E.2d 185 (1982) 3n, 5, 6n

McMurry v. Phelps, 533 F.Supp. 742 (D.La. 1982) 7n

Miller v. County of Dickinson, 68 Iowa 102, 26 N.W. 31 (1885) 15n

Newsom v. Vanderbilt University, 653 F.2d 1100 (6th Cir. 1981) 11n

Powell v. Texas, 392 U.S. 514 (1968) 5n
Putnam v. Gerloff, 639 F.2d 415 (8th Cir. 1981) 7n
Ramsey v. Ciccone, 310 F.Supp. 600 (W.D. Mo. 1970) 6n
Robinson v. California, 370 U.S. 660 (1962) 5n
Sisters of Charity of Providence v. Washington Co., 244 Ore. 499, 419 P.2d 36 (1966) 15n
Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980) 17n
Spicer v. Williamson, 191 N.C. 487, 132 S.E. 291 (1926) 15n
Trinity Hospital Association v. City of Minot, 76 N.W. 2d 916 (N.D. 1956) 16n
Wilmington General Hospital v. Manlove, 54 Del. 10, 174 A.2d 135 (1961) 6n
Windham Commun. Mem. Hosp. v. City of Willimantic, 166 Conn. 113, 348 A.2d 651 (1974) 16n
Wright v. City of Reno, 533 F.Supp. 58 (D.Nev. 1981) 7n
Youngberg v. Romeo, 102 Sup. Ct. 2452 (1982) 5n

STATUTES.

United States Constitution
Fifth Amendment 4
Eighth Amendment 2, 5
Fourteenth Amendment 3, 4
42 U.S.C.
§ 291 *et seq.* (1982) (Hospital Survey and Construction Act, 60 Stat. 1941 (1946)) 10n, 11n
§ 291(e)(3) 11n
§ 3000-1(6) (1976) (Public Health Service Act, Title XVI § 1602(6) 58 Stat. 690 13n

§ 1396 *et seq.* (1976) (Medicaid, Social Security Act, Title XIX, 79 Stat. 343 (1965)) 13n, 15n

42 C.F.R.
§ 53.111 (1976) 11n, 12n
§ 53.113 (1976) 11n
§ 124.501 (1981) 11n
§ 124.503 (1981) 11n
§ 124.505 (1981) 12n
§ 124.506 (1981) 11n
§ 124.507 (1981) 11n
§ 124.509 (1981) 12n
§ 124.603 (1981) 12n
§ 435.1008 (1978) 15n
§ 435.1009 (1978) 15n

44 F.R.
29373 (1979) 11n
29382 (1979) 11n
29394 (1979) 13n

Massachusetts General Laws
c. 6A, §§ 31 et seq. 18n
c. 111, § 70E 9n, 10n
§ 70E(l) 8n, 9n
§ 70E(m) 9n
c. 118E 13n
§ 5 14n
§ 6 14n
§ 18 14n
c. 231, §§ 60B-E 10n

MISCELLANEOUS.

Accreditation Manual for Hospitals, Joint Commission on Accreditation of Hospitals 10n

No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Amicus Curiae, the Massachusetts Hospital Association, Inc.

Interest of the Massachusetts Hospital Association, Inc.

This brief as amicus curiae is submitted on behalf of the Massachusetts Hospital Association, Inc. with the written consent of both parties. Letters consenting to this filing have been filed with the clerk.

The Massachusetts Hospital Association, Inc. (MHA) is a not-for-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts. One-hundred five licensed hospitals, representing 96.4 percent of the acute care beds in this state are members of this Association.

The MHA represents its members in hospital-related issues before the legislative and judicial branches of the Commonwealth, coordinates their activities in many areas, including education and research, and on behalf of its members has certain consulting and negotiating roles recognized by statute.

Because of a long tradition of rate regulation and control by state government affecting the financial viability of hospitals in Massachusetts, MHA frequently serves as a negotiator on behalf of its members with the federal and state governments.

While the issue before the Court in this matter primarily revolves about constitutional rights of a person in the custody of police, the financial fallout of an adverse determination for the hospital will have an impact upon all hospitals that are members of this Association and who must negotiate with the state and its political subdivisions for the care of persons in police custody.

As a result, the MHA has a unique interest in both the constitutional issue to be resolved and the marketplace impact of that determination.

This brief on behalf of the MHA urges acceptance of the principle enunciated in the court below that the City of Revere must be held initially liable to the hospital for the medical services the hospital rendered.

Summary of Argument.

The Eighth Amendment proscription against "cruel and unusual punishment" is triggered by deprivation of liberty

thereby avoiding a false demarcation that would deny its availability until trial and conviction. Alternatively, the proscription is enforced through due process requirements of the Fourteenth Amendment. The obligation to ensure these rights remains with the custodian, which, in the instant case, requires making available appropriate medical care for a wounded prisoner. When that care is made available through private institutions, the concurrent obligation to pay for that care remains with the custodian. (Pp. 16-18.)

Statutory and regulatory mandates that direct the manner in which such care will be made available by private institutions cannot be enlisted to shift the obligation to pay for that care from a public to a private entity. (Pp. 7-16.)

Argument.

I. Introduction.

The Supreme Judicial Court of Massachusetts held that Kivlin was a prisoner in the custody of the Revere Police Department during the period of his hospitalization immediately following his arrest, and that City of Revere was therefore liable for the expenses of that confinement.[1] The court reasoned that the deprivation of liberty associated with Kivlin's detention triggered the requirement for the government to provide medical care.

Relying on *Estelle* v. *Gamble*,[2] the court below concluded that the Eighth Amendment's prohibition of indifference to

---

[1] *Massachusetts General Hospital* v. *Revere*, 385 Mass. 772, 776-777 (1982).

[2] 429 U.S. 97 (1976).

the medical needs of prisoners compelled a governmental agency or subdivision responsible for supplying those needs to pay for them. Petitioner, also relying on *Estelle*,[3] *supra*, has argued that the Eighth Amendment's prohibition applied only to incarcerated prisoners. In the petition for certiorari to this Court, petitioner now supports this argument by reference to *Ingraham* v. *Wright*[4] and *Bell* v. *Wolfish*,[5] wherein the court stated that the Eighth Amendment protections apply to cruel and unusual punishment inflicted following trial and conviction.

In addition, petitioner raises a question as to whether a private hospital is obligated to furnish medical care to prisoners in police custody without compensation.

Amicus intends to support the determination by the court below that the prisoner's right to medical care is triggered by the Eighth Amendment prohibitions against cruel and unusual punishment or alternatively, by the due process requirements based on the Fifth and Fourteenth Amendments.

Further, amicus supports the respondent's contention that the obligation to pay for the prisoner's care is one that rests initially with the City of Revere.

II. The Protections Afforded under the Eighth Amendment and the Fourteenth Amendment are Triggered by an Individual's Loss of Freedom when He Cannot, by Reason of the Deprivation of this Liberty, Care for Himself.

The scope of protection available under the Eighth Amendment is broad. As this Court has noted, the Eighth Amend-

---

[3] 429 U.S. at 103.

[4] 430 U.S. 651 (1977).

[5] 441 U.S. 520 (1979).

ment prohibits punishment of an individual on the basis of status alone in the absence of some act.[6] Recent cases have dealt with the kinds of punishment which are acceptable following an adjudication of guilt, as in *Gregg* v. *Georgia*.[7] By contrast, from Robinson we may deduce the principle that punishment itself is unjustifiable in the pre-conviction stage, when the suspect's status is merely that of a detainee. Since deprivation of needed medical care constitutes punishment, such conduct is prohibited under the Eighth Amendment.[8] In the instant case Kivlin's detainee status attached at the moment that he was deprived of his liberty.[9] This deprivation of his liberty triggers his right to necessary emergency medical care and obligates the City of Revere to present the prisoner for care, and having done so, to obligate itself to respondent for the cost of that care.[10] Alternatively, this same conclusion could be reached by due process analysis grounded in the Fifth and Fourteenth Amendments.

Due process requires that there be no punishment in the absence of an adjudication of guilt. This Court has so found specifically for pretrial detainees.[11] The status of detainee im-

---

[6] See *Robinson* v. *California*, 370 U.S. 660 (1962); *Powell* v. *Texas*, 392 U.S. 514 (1968).

[7] 428 U.S. 153 (1976).

[8] See e.g., *Fielder* v. *Bosshard*, 590 F.2d 105, 107 (5th Cir. 1979); *Bowring* v. *Godwin*, 551 F.2d 44, 46 (4th Cir. 1977).

[9] 385 Mass. at 778 where the court below succinctly stated the facts and determination of custody. "[A]t the time the police bullet entered his body he was under arrest. He was intentionally seized by the police at that moment and a reasonable person could only believe that he was then under arrest."

[10] Amicus offers no support to broaden the city's obligation beyond the specifics of a prisoner under arrest and injured either by direct police action or in attempting to avoid arrest.

[11] *Bell* v. *Wolfish*, 441 U.S. at 535 n.16; *Ingraham* v. *Wright*, 430 U.S. at 671-672 n.40; See also *Youngberg* v. *Romeo*, 102 S. Ct. 2452 (1982).

mediately imposes an obligation on government vis-à-vis the detainee. If he has already been convicted then this obligation may be coupled with punishment, provided this is neither cruel nor unusual. If not yet convicted, the obligation is coupled with a requirement that he not be punished. In either case, the government's obligation is triggered by the fact of detention, which operates to deprive the individual of a protected liberty interest. The essential factor is that of detainee status.

The suspect may be restricted in or deprived of his freedom prior to an adjudication of guilt, but if this is accompanied by conduct amounting to punishment, the due process standard will be violated. Pretrial detainees retain at least those unconstitutional rights that are enjoyed by convicted prisoners. Thus, "conditions found to constitute cruel and unusual punishment when imposed on convicted inmates would surely be viewed as unconstitutional punishment when imposed on similarly situated unconvicted detainees."[12]

In the instant case the facts overwhelmingly support the determination that Kivlin's status at the time of the emergency medical care was that of a detainee. The court below finds that an arrest has occurred when there has been an intentional and an actual or constructive seizure or detention of the person, and this is so understood by the person detained.[13] By this standard Kivlin was a detainee at the time he was taken to the hospital.

Due process also requires that a pretrial detainee not be punished. The constitutional issue rests on a determination of

---

[12] *Campbell* v. *Cauthron*, 623 F.2d 503, 505 (8th Cir. 1980).

[13] 385 Mass. at 778, see n.9, *supra*. See also *Ramsey* v. *Ciccone*, 310 F. Supp. 600 (W.D. Mo. 1970); *Dodge City Med. Center* v. *Bd. of Cty. Com'rs*, 6 Kan. App.2d 731, 634 P.2d 163 (1981); *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979).

whether or not the circumstances are punitive in nature.[14] Failure to provide reasonable medical services, the lack of which could result in deprivation of life, would constitute a due process violation. Similarly, "failure to provide a pretrial detainee with an environment that does not impair his mental and emotional health is punishment and violative of his Fourteenth Amendment rights."[15] Due process violation is clearly not limited to behavior which would constitute cruel and unusual punishment. But that conduct which would violate the Eighth Amendment for convicted inmates would certainly constitute a due proces violation for detainees. This is a clear and necessary result of the teaching of *Bell, supra.*

III. A State or Federal Statute Requiring Hospitals to Make Certain Services Available does Not Create an Independent Obligation on the Part of a Private Hospital to Render Services Without Compensation to the Hospital.

Petitioner raises the issue whether a private hospital has an obligation to provide emergency medical services to persons in the custody of police *without compensation*. Petitioner appears to argue that certain legislation requiring hospitals to provide emergency services operates to assure the universal availability of free emergency care in Massachusetts, thereby shifting the financial burden of caring for prisoners from the responsible governmental entity to private hospitals.[16] This

---

[14] See *Putnam* v. *Gerloff*, 639 F.2d 415, 419 (8th Cir. 1981); *Campbell* v. *Cauthron*, 623 F.2d at 505; *Bowring* v. *Godwin*, 551 F.2d at 47.

[15] *McMurry* v. *Phelps*, 533 F. Supp. 742, 762 (W.D. La. 1982). See also *Wright* v. *City of Reno*, 533 F. Supp. 58, 65-66 (D. Nev. 1981).

[16] Brief of Petitioner, p. 13.

case, however, does *not* involve any issue of a private hospital's obligations to provide services free of charge. Moreover, legislation requiring hospitals to make certain services available does not create any independent obligation on the part of a private hospital to render services without compensation. Reliance upon hospitals to treat prisoners in accordance with such a hypothetical duty is wholly unwarranted.

It is obvious that ordinary statutory requirements for the type and quality of hospital services, facilities, and staff in no way purport to require a private hospital to offer such services without compensation. On the contrary, it is clearly understood that the hospital provides such services in return for appropriate compensation.

The Massachusetts Patients Bill of Rights requires hospitals to render prompt life saving treatment to persons who are not yet admitted as patients if the hospital has a certified emergency care unit.[17] The statute does not require a private hospital to render emergency services gratuitously.[18] The statute is

---

[17] Mass. Gen. Laws Ann. c. 111, § 70E(k). The Patients Bill of Rights was enacted on May 23, 1979, more than 8 months after Kivlin was brought to the hospital, and does not apply in this case.

The statute grants to hospital patients, *inter alia*, the right: "(k) to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment and without delaying treatment for purposes of prior discussion of the source of payment unless such delay can be imposed without material risk to his health, and this right shall also extend to those persons not already patients or residents of a facility if said facility has a certified emergency care unit;"

[18] Traditionally, the common law in most states held that a private hospital had no duty to accept any patient. *Guerrero* v. *Copper Queen Hospital*, 112 Ariz. 104, 537 P.2d 1329 (1975). A minority rule developed following *Wilmington General Hospital* v. *Manlove*, 54 Del. 15, 174 A.2d 135 (1961), holding that, while a private hospital is under no duty to maintain an emergency ward, if the hospital does maintain such a ward and holds it open to the public, it must provide emergency services to anyone who could reasonably be considered to require emergency care. Both the majori-

designed to ensure that hospitals act to provide life-saving care first, and determine how they will receive payment for care later. It focuses upon the prompt delivery of care in emergency situations, in contrast to non-emergency hospital admissions, where a hospital may determine a prospective patient's source of payment for services, before the services are rendered.

The text of the statute clearly contemplates that the hospital will receive payment and even permits delaying treatment to discuss the source of payment where "such delay can be imposed without material risk to [the patient's] health."[19] The hospital's statutory duty is to render emergency care in a nondiscriminatory manner *before* determining the source of payment. It cannot be interpreted as a duty to render gratuitous care without distorting both the language and the purpose of the statute. The City of Boston, in its brief as *amicus curiae*, suggests that a statutory duty to provide emergency care to all those who require it is tantamount to requiring free emergency

---

ty and minority rules, however, only addressed the rendering of services in response to complaints that services had not, in fact, been rendered. Neither suggested that such services be provided without compensation.

[19] Mass. Gen. Laws Ann. c. 111, § 70E(k). Other provisions in the Patients Bill of Rights also contemplate that the hospital will receive payment from some source. The fourth (unnumbered) paragraph of the statute provides: "Every such patient or resident of said facility in which billing for service is applicable to such patient or resident, upon reasonable request, shall receive from a person designated by the facility an itemized bill reflecting laboratory charges, pharmaceutical charges, and third party credits and shall be allowed to examine an explanation of said bill regardless of the source of payment. . . ." Mass. Gen. Laws Ann. c. 111, § 70E.

Similarly, a separate provision grants patients the right "upon request to receive a copy of the bill or other statement of charges submitted to any third party by the facility for the care of the patient or resident." Mass. Gen. Laws Ann. c. 111, § 70E(m).

care to all who require it.[20] But the statute is not restricted to indigent persons; it grants the right to prompt treatment to all patients in an emergency. If the statute were construed to require such care to be rendered free of charge, it would have to be given free to all patients, regardless of health insurance coverage or ability to pay. Plainly, the statute does no such thing. It simply ensures that hospitals will do as respondent did in this case: help first, and ask questions later.

Certain hospitals that received construction assistance grants under the Hill-Burton Act gave assurances to the federal government that they would provide a reasonable volume of uncompensated services to needy persons over a period of twenty years.[21] The Department of Health, Education and Welfare interpreted the concept underlying such assurances to be that facilities undertook to provide a fixed amount of uncompensated services, not an open-ended charitable obliga-

---

[20] Brief of Amicus Curiae City of Boston, p. 10, n.12. While a hospital that refused to provide emergency care would be subject to liability for malpractice, liability is clearly grounded in the *failure to treat*. Mass. Gen. Laws Ann. c. 111, § 70E and c. 231, §§ 60-B-E. None of the statutory provisions cited imposed liability for failure to provide *gratuitous* care. If care is in fact (properly) rendered, no malpractice liability attaches, and the hospital is certainly entitled to payment for such care. (An exception to the hospital's entitlement to payment for care could arise independently if the hospital had received Hill-Burton funds and elected to provide uncompensated services to the patient in question.) (See n.21 below and accompanying text.) Similarly, standards published by the Joint Commission on Accreditation of Hospitals in its Accreditation Manual for Hospitals address the quality of emergency service rendered, without any suggestion that such services be provided gratuitously.

[21] Hospital Survey and Construction Act, 60 Stat. 1041 (1946), Public Health Service Act, Title VI, § 603(e), codified at 42 U.S.C. § 291c(e) (1982). It cannot be assumed that respondent is among those hospitals subject to Hill-Burton since the record is silent on the question.

tion.[22] Moreover, the Act excuses a hospital from its assurance to the extent that compliance is not financially feasible.[23]

The obligations of hospitals under the Hill-Burton Act do not serve to make universal free care available.[24] The class of patients intended to receive the benefit of expanded hospital facilities free of charge are persons whose income and assets are insufficient to pay for hospital services.[25] Eligibility is firmly grounded in a patient's inability to pay; if some third party, such as a government agency or an insurer, is legally responsible to pay for a patient's care, that patient would not

---

[22] Summary of Public Comments and Department's Actions on the Uncompensated Services and Community Service Regulations, 44 F.R. 29382 (May 18, 1979). Under present regulations, the reasonable volume of services is limited to an aggregate dollar amount. 42 C.F.R. §§ 124.501, 124.503(a) (1981).

[23] 42 U.S.C. § 291c(e)(3). Regulations in effect at the time Kivlin was treated at MGH did not require any hospital covered by Title VI to make up any "deficit" in its volume of free care. 42 C.F.R. 53.111(e)(2)(iii) (1976). Current regulations require a deficit caused by financial hardship to be made up in the future, but leave the decision as to when to provide such free care solely to the discretion of the hospital, thus permitting a hospital to offer free care as and when its financial condition permits. See 42 C.F.R. § 124.503(b)(1) (1981).

[24] *Newsom* v. *Vanderbilt University*, 653 F.2d 1100, 1117 (6th Cir. 1981) (Hill-Burton not intended to provide needed services for all who could not pay).

[25] Under regulations in effect in 1978, the state agency sets criteria for eligibility. 42 C.F.R. § 53.111(g) (1976). Present regulations provide for federal establishment of eligibility criteria according to the Community Services Administration Poverty Income Guideline. 42 C.F.R. § 124.506 (1981). Persons with incomes at or below the poverty level are eligible for free care; but hospitals may, if they choose, charge persons with incomes above the poverty level for all or part of the services rendered. 42 C.F.R. § 124.506(a)(2) (1981).

The regulations make clear that hospitals may tailor their plans for compliance according to their own best judgments, and may decide when and what kind of services are made available free of charge. 42 C.F.R. § 124.507 (1981); 44 F.R. 29373 (May 18, 1979).

be eligible for uncompensated services under Hill-Burton.[26] The entire structure of the Act and regulations clearly further a goal of aiding the needy, those persons who, in days gone by, would have been considered "charity cases." If the Act were construed to require hospitals to provide free care to felons, misdemeanants, and suspects in custody, the sole beneficiaries would be the state and local treasuries. The real burden would fall on needy civilian patients, for hospitals would have fewer uncompensated services to offer the poor.[27]

The only instance in which a hospital is obliged to provide free care, regardless of eligibility for uncompensated services, is contained in the regulations which prohibit a hospital having an emergency unit from denying emergency services to a community resident even if that person is unable to pay for such services.[28] If that person is in fact eligible for uncompensated services, however, the services may be counted to fulfill the hospital's quota of free care. A hospital is not obligated to offer non-emergency services to persons unable to pay therefor, unless those persons are eligible for the uncompensated service provided by the hospital.[29]

---

[26] Services are not counted as uncompensated if the hospital is entitled to payment from a governmental program or third party insurer. 42 C.F.R. § 53.111(f)(2) (1976); 42 C.F.R. § 124.509 (1981).

[27] Regulations requiring notice of the availability of free services to be published in local newspapers and posted in the hospital are additional evidence that the obligation extends to civilian community residents, not state or local prisoners. 42 C.F.R. § 53.111(h)(4), (i) (1976); 42 C.F.R. § 124.505(a), (b) (1981).

[28] 42 C.F.R. § 124.603(b)(1) (1981). The emergency services required to be offered are only those necessary to treat the emergency; that is, to stabilize the patient, who may be transferred to another hospital willing and able to admit an indigent patient, if his medical condition permits. 42 C.F.R. § 124.603(b)(2) (1981).

[29] 42 C.F.R. § 53.111(d) (1976); 42 C.F.R. § 124.603(a) (1981). Such services are, of course, to be offered to all persons living in the service area without discrimination on the basis of race, color, national origin, creed, or

The general thrust of the Hill-Burton legislation is to cause those hospitals that have received federal assistance to repay the federal government by providing services to their communities. The assurances of free care are clearly intended as last resort for the poor in the community.[30] There is no indication that they were meant to shield the state or its cities and towns from paying for the care of prisoners. Indeed, Hill-Burton would be an ineffective mechanism to ensure care for prisoners, since a government's obligation to provide medical care to its prisoners is continuous and non-delegable, while not all hospitals have received Hill-Burton assistance, and those that have may have already satisfied their obligations to provide free care, or may do so in the foreseeable future. Accordingly, not all hospitals to which wounded suspects or prisoners might have to be sent in an emergency have or will have any obligation to provide any free care. In any event, not all prisoners are eligible for free services even if they were to reach a hospital that is subject to Hill-Burton obligations. Thus, Hill-Burton is not a rationale for assuming that hospitals can or must provide services to prisoners free of charge.

The Massachusetts Medicaid Act[31] was established in conformity with Title XIX of the Social Security Act[32] to provide assistance to certain residents of the commonwealth. Pursuant to the act, Massachusetts voluntarily participates in a

---

any other ground unrelated to medical need or the availability of the service within the hospital. Grounds for denial of non-emergency services include inability to pay. The "community service obligation" of a hospital receiving Hill-Burton funds merely requires opening newly constructed facilities to persons in the community service area. Public Health Service Act, Title XVI § 1602(6) 58 Stat. 690, codified at 42 U.S.C. 300o-1(6) (1976). A hospital is entitled to charge persons able to pay for such services.

[30] See 44 F.R. 29394 (May 18, 1979).

[31] Mass. Gen. Laws Ann. c. 118E.

[32] 79 Stat. 343 (1965), codified at 42 U.S.C. § 1396 *et seq.* (1974).

federally approved Medicaid plan and receives federal reimbursement for a percentage of the costs of medical care provided to eligible patients which the state incurs.[33] The federal-state joint venture is clearly designed to enable certain needy persons to obtain necessary medical care by making state and federal governments responsible for payment for such care.[34]

Coverage under Medicaid means simply that such care will be paid for by the government under the Medicaid regulations.[35] Both the federal and state acts and regulations provide extensive rules for determining when and how services will be paid for. Neither purports to prescribe the kinds of services that must be provided by hospitals in the abstract, nor what kinds of services must be provided to persons who are not Medicaid beneficiaries. To the extent that Medicaid furthers a social policy favoring care for the indigent, it does so explicitly by paying for such care. It does not create any new social policy that care should be rendered gratuitously.

In keeping with the general purpose of the Medicaid program to use state and federal monies to pay for the care of the medically needy indigent, eligibility for services as a Medicaid beneficiary are strictly defined in terms of financial condition or disability. It is clear that prisoners are not among the intended beneficiaries of Medicaid programs. Both the Federal

---

[33] State participation in the Medicaid program is entirely voluntary. Moreover, hospital participation in the Massachusetts Medicaid program is also voluntary. Mass. Gen. Laws Ann. c. 118E, § 18.

[34] *Harris* v. *McRae*, 448 U.S. 297 (1980).

[35] The Massachusetts act provides medical assistance for the types of care specified in Title XIX and regulations adopted thereunder. Mass. Gen. Laws Ann. c. 118E, § 6. In Massachusetts, the Department of Public Welfare is charged with furnishing medical assistance to eligible persons. The statute also requires that "[p]ayment shall be made to the person or institution supplying medical services." Mass. Gen. Laws Ann. c. 118E, § 5.

Act and regulations exclude from coverage services to inmates of penal institutions.[36] The existence of the Medicaid or any other public welfare program cannot serve to absolve penal authorities of their financial responsibility for the care of prisoners.

No court, to the knowledge of *amicus*, has found a private hospital obliged to provide free care to a person in police custody on the basis of statutes merely prescribing that certain services be made available by the hospital.[37] Indeed the cases known to *amicus* in which a private hospital was found not to be entitled to collect payment from the arresting jurisdiction did not address or even mention any obligation on the part of the hospital to provide free care.[38] Rather, such cases were

---

[36] 42 U.S.C. § 1396(d), 42 C.F.R. §§ 435.1008, 435.1009 (1978).

[37] *Dodge City Med. Center* v. *Bd. of Cty. Com'rs*, 6 Kan. App.2d 731, 634 P.2d 163 (1981) (sheriff has duty to furnish medical attention to suspect shot by police in pursuit, at the county's expense if the suspect is indigent and no other source of funds is available); *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979) (county obligated to provide and pay for necessary emergency medical services rendered by hospital to suspect wounded by police and jailed prisoner with sudden agina, under *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *City of Tulsa* v. *Hillcrest Medical Center*, 292 P.2d 430 (Okla. 1956). (City had duty to pay for emergency hospital care of prisoners and suspects, even in absence of statute requiring city to provide medical services to prisoners, since statutes requiring jail maintenance imply city's authority to appropriate funds for medical care); *City of Tulsa* v. *Sisler*, 285 P.2d 422 (Okla. 1955) (same); *Lamar* v. *Board of Com'rs*, 4 Ind. App. 191, 30 N.E. 912 (1892) (same, applicable to county); *Sisters of Charity of Providence* v. *Washington Co.*, 244 Ore. 499, 419 P.2d 36 (1966) (county had obligation to pay for hospital care of suspect derived from jailkeeper's statutory duty to provide medical aid to prisoners in jail and statutory provision for expenses of prison maintenance to be paid out of county treasury); *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926) (county's statutory duty to care for prisoners includes duty to pay for necessary care of wounded suspect provided outside jail in emergency circumstances); *Miller* v. *County of Dickinson*, 68 Iowa 102, 26 N.W. 31 (1885) (same).

[38] *Dade Cty.* v. *Hospital Affiliates Intern.*, 378 So.2d 43, 44 (Fla. App. 1979) (county not required to pay for care of men stabbed in domestic alter-

decided solely upon the absence of city or county statutory authority to contract for payment for *ad hoc* services outside a jail. There was no suggestion that a private hospital had any independent duty to provide free care.[39]

There is no question in this case that state and local governments have an affirmative duty to provide medical care for persons in their custody. The contention that cities ought not be troubled to pay for such care because hospitals must provide it anyway is both incorrect and improper. It would convert a public duty into a private burden.

IV. The Obligation of a Governmental Subdivision to Preserve the Constitutional Rights of a Detainee by Making Medical Care Available Compels that Agency to Pay for Such Care.

An individual is entitled to the protection and preservation of his constitutional rights which attach at the moment when

---

cation because they were neither in police custody nor under arrest; the court in dictum noted that "we may assume that a county or other governmental entity would be liable to a . . . hospital which renders medical services to its prisoners"); *Windham Commun. Mem. Hosp.* v. *City of Willimantic*, 166 Conn. 113, 348 A.2d 651 (1974) (city had no obligation to pay for care of suspect wounded in arrest, because statutes requiring maintenance of prisoners did not cover medical care and applied only to towns, not cities); *Trinity Hospital Association* v. *City of Minot*, 76 N.W.2d 916 (N.D. 1956) (in absence of express statutory authority, city not obligated to pay hospital for care of prisoner).

[39] In contrast, a public hospital might be required to provide free care to certain needy community residents if the statute creating such public hospitals expressly obligates them to offer free care. *King County* v. *City of Seattle*, 70 Wash. 2d 988, 425 P.2d 887 (1967) (en banc) (city not obligated to pay for care of indigent city prisoners, because no statute required city to pay for such care, but statute establishing county hospitals explicitly required hospitals operated by counties to admit free of charge persons unable to pay).

his liberty right is restricted by the State. The essential factor is his status as detainee. The distinction between the pre and post-conviction detainee inheres to the question of punishment. Adjudication of guilt warrants punishment, but under the Eighth Amendment it must not be either cruel or unusual. For the pre-trial detainee, however, due process prohibits punishment. In either case once detainee status attaches a governmental obligation of care follows. Thus, the government is obligated to provide necessary medical care for those whom it is punishing by incarceration.[40] In considering questions of govermental obligation with respect to constitutional rights, it is amicus' view that it is immaterial whether these arise in the pre or post-conviction stage of the criminal process, since it is only the fact of the individual's status as detainee which is relevant. Thus, both Eighth and Fourteenth Amendment definitions of punishment and limitations on conditions of confinement are relevant to the analysis of necessary medical treatment of any pretrial detainee.

Lower courts have agreed that the government is responsible for protection and preservation of the constitutional rights of detainees. When a state legitimately acts to deprive a person of his liberty, it is obligated to assume the economic burden necessary to preserve the constitutional rights of the person jailed or imprisoned.[41] Moreover, inadequate funding may not be used to justify the perpetuation of unconstitutional conditions of confinement.[42] Similarly, economic justifications alone cannot support the deprivation of constitutional rights.[43]

---

[40] *Estelle* v. *Gamble*, 429 U.S. at 103.

[41] *Dawson* v. *Kendrick*, 527 F. Supp. 1252, 1283 (S.D. W.V. 1981).

[42] *Smith* v. *Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980).

[43] *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 688 (D. Mass. 1973) *aff'd.* 494 F.2d 1196 (1st Cir.), *cert. denied sub nom.*; *Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974).

Amicus advises the court that many hospitals in the Commonwealth do not bill for services rendered to this class of patient based on years of frustrated effort to recover payment from governmental subdivisions. However, this lack of payment now becomes even more damaging with the implementation of a major statutory change regulating reimbursement to hospitals in Massachusetts.[44] Hospital budgets are so impacted by this Act that some are reducing services and furloughing employees.

While denial of payment for these services may benefit the city treasury, it places a discriminatory burden on the small class of sick patients who utilize that hospital since the cost must be recovered from some source. It is also the practice in most hospitals to first seek recovery of these costs from insurance coverage held by the prisoner. The likelihood of a prisoner wounded by police during apprehension as a suspect in a crime having health insurance coverage would defy calculation.

Thus, in most instances, the hospital, and so its patients, are left to bear a burden that should be more appropriately shared by the general population.

---

[44] Mass. Gen. Laws Ann. c. 6A, § 31 *et seq.*, as amended by c. 372, Acts of 1982. Its avowed purpose is to restrain the rate of growth of hospital costs in Massachusetts and equalize payment to hospitals by third party payors. It is estimated that the institutions will face a loss against expected net revenue in the fiscal years 1983 through 1985 of $283,000,000 from only one factor in the act. Mass. Health Care Coalition overview and impact report, August, 1982.

Conclusion.

The judgment of the Supreme Judicial Court of Massachusetts that the petitioner, responsible for the prisoner's deprivation of liberty, should bear the financial burden required to protect the prisoner's constitutional rights, should be affirmed.

Respectfully submitted,

PATRICK R. CARROLL,
Counsel of Record,
WILLIAM T. McGRAIL,
Attorneys for Amicus Curiae,
MASSACHUSETTS HOSPITAL
ASSOC., INC.,
Five New England Executive Park,
Burlington, Massachusetts 01803.
(617) 272-8000

On the Brief:
WENDY K. MARINER